No. 91-5397

In the Supreme Court of the United States

OCTOBER TERM, 1992

EMERY L. NEGONSOTT, PETITIONER

v.

HAROLD SAMUELS, WARDEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether 18 U.S.C. 3243 confers criminal jurisdiction on the State of Kansas to prosecute petitioner for an offense, committed on an Indian reservation, that would otherwise be within exclusive federal jurisdiction under the Major Crimes Act, 18 U.S.C. 1153.

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INTEREST OF THE UNITED STATES

The question presented by this case is whether the grant of criminal jurisdiction to the State of Kansas in 18 U.S.C. 3243 implicitly exempts those crimes that would otherwise be within exclusive federal jurisdiction under the Indian Major Crimes Act, 18 U.S.C. 1153. The Court's resolution of that question will have a substantial impact on federal law enforcement responsibilities in Kansas, as well as in Iowa and North Dakota, for which Congress enacted similarly worded statutes. The United States therefore has a strong programmatic interest in the outcome of this case. Furthermore, the United States has an

interest in this case because of its special relationship with the Indian Tribes, and its long experience and expertise in Indian law matters.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 3243 (the Kansas Act) states:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The Indian Major Crimes Act, 18 U.S.C. 1153, states in relevant part:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

STATEMENT

1. Petitioner Emery Negonsott is an enrolled member of the Kickapoo Tribe in Kansas, a federally recognized Indian Tribe. In 1985, he was arrested by the Brown County Sheriff, a state law enforcement official, in connection with the shooting of another Indian on the Kickapoo Reservation. Petitioner was subsequently convicted in Kansas state court of aggravated battery. The Supreme Court of Kansas affirmed, holding that the State had criminal jurisdiction over the offense. *State* v. *Nioce*, 716 P.2d 585 (Kan. 1986) (Pet. App. 21-34).[1]

2. Petitioner then filed the present habeas corpus action in the United States District Court for the District of Kansas. He claimed that 18 U.S.C. 3243, which grants the State of Kansas criminal jurisdiction over crimes by or against Indians committed on Indian reservations in Kansas, does not extend to aggravated battery. In petitioner's view, that crime, by virtue of being encompassed by the Indian Major Crimes Act, 18 U.S.C. 1153, remains subject to exclusive federal jurisdiction.

The district court rejected petitioner's claim. In the court's view, 18 U.S.C. 3243 grants Kansas jurisdiction over all crimes, even those covered by the Indian Major Crimes Act, over which the United States retains concurrent jurisdiction. Pet App. 35-

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[1] In so holding, the Supreme Court of Kansas overruled its prior decision in *State* v. *Mitchell*, 642 P.2d 981 (1982).

43. The Court of Appeals for the Tenth Circuit affirmed on the same ground. *Negonsott* v. *Samuels*, 933 F.2d 818 (1991) (Pet. App. 44-64).

SUMMARY OF ARGUMENT

The statute at issue, 18 U.S.C. 3243, was the first of several Acts of Congress that granted individual States jurisdiction to prosecute crimes committed by or against Indians on Indian reservations within their respective borders. The scope of Section 3243 is conspicuously broad. The first sentence of the statute, by its plain language, confers plenary jurisdiction on the State over crimes committed by or against Indians on reservations within the State "to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State." 18 U.S.C. 3243. That language is unqualified; by its terms, it permits the State to assume jurisdiction to prosecute petitioner for his crime of aggravated battery.

Petitioner contends, however, that the second sentence of the statute implicitly limits the scope of the unqualified grant of jurisdiction conferred by its first sentence. The second sentence provides that nothing in the statute shall "deprive" the federal courts of jurisdiction "over offenses defined by the laws of the United States." 18 U.S.C. 3243. Petitioner argues that because the Indian Major Crimes Act, 18 U.S.C. 1153, covers the conduct for which he was charged under state law, and because federal jurisdiction under the Indian Major Crimes Act ordinarily is exclusive, the preservation of federal jurisdiction in the second sentence of Section 3243 must be read to retain the "exclusive" aspect of that jurisdiction under the Indian Major Crimes Act. In other

words, petitioner argues that the federal courts are "deprived" of jurisdiction under Section 3243 if federal jurisdiction that was previously exclusive is made concurrent.

Petitioner's reading of Section 3243 is incorrect. The text of Section 3243 as a whole demonstrates that Congress granted Kansas *complete* criminal jurisdiction on Indian reservations, over both major and minor crimes. Although this interpretation eliminates the otherwise exclusive nature of federal jurisdiction under 18 U.S.C. 1153 over major crimes committed by Indians in Kansas, that was precisely the purpose of the first sentence of Section 3243. This interpretation in no sense "deprives" the federal courts of their subject matter jurisdiction over offenses defined by the laws of the United States. The federal courts retain jurisdiction to entertain any prosecution under the Indian Major Crimes Act.

Only this reading of Section 3243 gives full effect to the statute's language. Moreover, contrary to petitioner's contention (Pet. Br. 14), our reading does not work an "implied repeal" of the Indian Major Crimes Act. The exclusive nature of federal jurisdiction under the Major Crimes Act stems not from that Act, but from background principles of Indian law under which States have no jurisdiction over Indian country except as affirmatively granted by Congress. In Section 3243, however, Congress specifically granted Kansas plenary jurisdiction to prosecute state-law crimes committed by or against Indians on reservations within that State. Furthermore, federal jurisdiction over crimes defined by federal law remains exclusive of state jurisdiction; Kansas may not prosecute any Indian for a federal crime, but rather may only prosecute Indians for crimes as defined by state law.

Although resort to legislative history is unnecessary in light of the statute's clarity, Section 3243's legislative history strongly indicates that Congress understood that Kansas would enjoy complete criminal jurisdiction. That history demonstrates three primary points. First, prior to enactment of Section 3243, Kansas as a practical matter exercised jurisdiction over *all* crimes—major and minor—committed by or against Indians, regardless of whether the conduct involved was otherwise subject to federal jurisdiction. Second, the Indians in Kansas did not object to that regime of *de facto* state jurisdiction, and they in fact sought enactment of Section 3243 to ratify the legality of the State's exercise of jurisdiction. Third, Section 3243 was intended to confer on Kansas complete jurisdiction over all crimes, as defined by state law, committed on Indian reservations by or against Indians, while retaining jurisdiction in federal courts over crimes defined by federal law. There is no persuasive evidence that anyone involved in the legislative process believed that Section 3243's grant of plenary jurisdiction to the State implicitly excluded offenses that were theretofore within exclusive federal jurisdiction; instead, Congress intended that federal and state jurisdiction would be *concurrent* in those circumstances.

Finally, there is no merit to petitioner's contention that exposing him to state prosecution for his crime conflicts with general principles of Indian law. The canon of construction that statutes are to be liberally construed in favor of the Indians does not point to a ruling in petitioner's favor. First, that canon cannot overcome the clear text and history of Section 3243. Second, the statute's history makes clear that Section 3243 was enacted in part in response to requests from

the Indian Tribes in Kansas, and that the Tribes supported complete conferral of jurisdiction on the State to ensure adequate law enforcement on their reservations. Accordingly, it is consistent with the canon of construction on which petitioner relies—as well as with the special responsibility of the United States for the Indian Tribes—to interpret 18 U.S.C. 3243 to confer complete jurisdiction on the State.

ARGUMENT

18 U.S.C. 3243 CONFERS COMPLETE CRIMINAL JURISDICTION ON THE STATE OF KANSAS TO PROSECUTE ALL CRIMES DEFINED BY STATE LAW THAT ARE COMMITTED BY OR AGAINST INDIANS ON RESERVATIONS WITHIN THAT STATE, EVEN THOUGH SUCH CRIMES MIGHT OTHERWISE HAVE BEEN WITHIN EXCLUSIVE FEDERAL JURISDICTION

A. Background

The generally applicable framework governing criminal jurisdiction on Indian reservations is well established. Under 18 U.S.C. 1152, crimes committed by or against Indians in Indian country are subject to federal jurisdiction. However, the second paragraph of Section 1152 expressly excludes offenses committed by one Indian against the person or property of another.[2] Such offenses between Indians are typically subject to the exclusive jurisdiction of the Tribe concerned, except for offenses covered by the

[2] Offenses committed by one non-Indian against another non-Indian are implicitly excluded from 18 U.S.C. 1152 under *United States* v. *McBratney*, 104 U.S. 621 (1882), and its progeny. Those offenses are instead subject to state jurisdiction.

Indian Major Crimes Act, 18 U.S.C. 1153. That Act makes it a federal offense for an Indian to commit any of the crimes it enumerates against the person or property of another Indian or other person within Indian country. See *Duro* v. *Reina*, 495 U.S. 676, 696-697 (1990).

This Court has held that federal jurisdiction over those offenses committed by Indians that are covered by 18 U.S.C. 1153 is exclusive of state jurisdiction. *United States* v. *John*, 437 U.S. 634, 651 (1978); see also *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1962).[3] The Court has also repeatedly stated (albeit in dictum) that federal jurisdiction over other crimes under 18 U.S.C. 1152 likewise is exclusive of state jurisdiction. *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Williams* v. *Lee*, 358 U.S. 217, 220 n.5 (1959); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-471 & n.9 (1979). A number of state courts have likewise so held. See *State* v. *Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *Arquette* v. *Schneckloth*, 351 P.2d 921 (Wash. 1960); *In re Application of Denetclaw*, 329 P.2d 697 (Ariz. 1958); *State* v. *Kuntz*, 66 N.W.2d 531 (N.D. 1954); see also *State* v. *Warner*, 379 P.2d 66, 68-69 (N.M. 1963) (dictum); *State* v. *Jackson*, 16 N.W.2d 752, 754 (Minn. 1944) (dictum); 30 Op. Or. Att'y Gen. 11 (1960).[4]

Congress may, of course, alter these jurisdictional arrangements, and it has done so in some circumstances. Public Law 280, which was enacted in 1953, is the most familiar example. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. 1162 and 25 U.S.C. 1321-1362). That statute automatically conferred on certain States jurisdiction over offenses involving Indians in Indian country. The statute also authorized other States to assume such jurisdiction in certain circumstances. See *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 471-474.

Prior to Public Law 280's enactment, Congress passed a series of special statutes granting particular States jurisdiction over some or all Indian country within their respective borders. In particular, three virtually identical statutes conferred jurisdiction on Kansas, Iowa, and North Dakota to prosecute crimes committed by or against Indians on Indian reservations in those States. See Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. 3243) (Kansas Act); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa Act); Act of May 31, 1946, ch. 279, 60 Stat.

[3] In his petition for certiorari (Pet. 13-14), petitioner states that Indian Tribes have no jurisdiction over crimes enumerated in the Indian Major Crimes Act. This Court recently noted, however, that "[i]t remains an open question whether jurisdiction under § 1153 over crimes committed by Indian tribe members is exclusive of tribal jurisdiction." *Duro* v. *Reina*, 495 U.S. at 680 n.1 (citing *United States* v. *Wheeler*, 435 U.S. 313, 325 n.22 (1978)). And there is, of course, nothing in Section 1153 that expressly ousts the Tribe concerned of its jurisdiction to prosecute crimes based on the same conduct.

[4] In our amicus brief urging denial of the petition for certiorari in *Arizona* v. *Flint*, 492 U.S. 911 (1989) (denying cert.), we took the position that federal jurisdiction under 18 U.S.C. 1152 is exclusive. We relied, *inter alia*, on the decisions cited in the text; Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588) and its legislative history; and the background of special statutes (including 18 U.S.C. 3243, at issue in this case) that confer criminal jurisdiction on particular States.

229 (North Dakota Act).[5] This case concerns the oldest of those three statutes, 18 U.S.C. 3243, which was enacted in 1940 and conferred plenary criminal jurisdiction on the State of Kansas over the four Indian reservations within its borders.

B. The Plain Language Of Section 223 Unambiguously Confers On Kansas Complete Jurisdiction To Prosecute All Crimes Defined By State Law That Are Committed By Or Against Indians On Reservations Within That State

Section 3243 provides in full:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

[5] In language identical to that contained in 18 U.S.C. 3243, the Iowa Act conferred on the State jurisdiction over crimes committed by or against Indians on the Sac and Fox Indian Reservation in Iowa. See 62 Stat. 1161. The North Dakota Act likewise conferred jurisdiction with respect to crimes committed by or against Indians on the Devils Lake Sioux Reservation in that State. See 60 Stat. 229. The conferral of jurisdiction in the Iowa Act has been construed not to reach conduct that would come within federal jurisdiction under the Indian Major Crimes Act, 18 U.S.C. 1153. See *Youngbear* v. *Brewer*, 549 F.2d 74 (8th Cir. 1977), aff'g 415 F. Supp. 807 (N.D. Iowa 1976); *State* v. *Bear*, 452 N.W.2d 430 (Iowa 1990). As we argue below, that construction is incorrect. The question whether the North Dakota Act grants the State jurisdiction over conduct that also comes within federal jurisdiction under Section 1153 has not been determined by any court. See *State* v. *Hook*, 476 N.W. 2d 565, 571 n.6 (N.D. 1991) (reserving question).

The language of the first sentence of Section 3243 unambiguously confers criminal jurisdiction on Kansas over *all* offenses (as defined by state law) committed by or against Indians on Indian reservations, whether or not the conduct involved is also made a federal offense by 18 U.S.C. 1152 or 1153 (or by the laws of the tribe concerned). See Pet. App. 50-51.

Although petitioner does not focus on the language of Section 3243, he does not and cannot dispute that the first sentence of 18 U.S.C. 3243, standing alone, subjects him to state jurisdiction. He contends (Pet. Br. 5-11), however, that insofar as his offense is concerned, the jurisdiction conferred by the first sentence is destroyed by the second. The second sentence preserves the jurisdiction of federal courts "over offenses defined by the laws of the United States committed by or against Indians on Indian reservations." Petitioner argues that because the Indian Major Crimes Act includes the crime (aggravated battery) of which he was convicted [6]—and that because federal jurisdic-

[6] The Indian Major Crimes Act does not specifically mention battery, aggravated or otherwise. It does, however, include among the listed offenses "assault with intent to commit murder, assault with a dangerous weapon, [and] assault resulting in serious bodily injury." 18 U.S.C. 1153(a). The Kansas statute that petitioner was convicted of violating defines aggravated battery, in part, as "the unlawful touching or application of force" to another person, "which either:

tion under that Act ordinarily is exclusive—the preservation of federal jurisdiction in the second sentence of Section 3243 must be read to retain the "exclusive" aspect of that jurisdiction under the Indian Major Crimes Act. In petitioner's view, the first sentence of Section 3243 can be read according to its plain meaning only if Congress impliedly "repealed" the Indian Major Crimes Act. See Pet. Br. 14. Petitioner's argument misapprehends the import of both 18 U.S.C. 3243 and the Indian Major Crimes Act.

The text of Section 3243 as a whole demonstrates that Congress granted Kansas *complete* criminal jurisdiction, over both major and minor crimes. Although this interpretation eliminates the otherwise exclusive nature of federal jurisdiction under 18 U.S.C. 1153 over major crimes committed by Indians on reservations in Kansas, that was precisely the purpose of the first sentence of Section 3243. The second sentence, by its plain language, preserved the subject matter jurisdiction of federal courts over crimes defined by federal law. It does not suggest that this jurisdiction, as so preserved, is exclusive of the jurisdiction of the *state* courts over crimes defined by *state* law. In the words of 18 U.S.C. 3243, giving full effect to the first sentence's unqualified conferral of "jurisdiction" on the state courts over crimes defined by the "laws of the State" does not "deprive" the "courts of the United States" of their distinct "jurisdiction"

(a) [i]nflicts great bodily harm upon him; or * * * (c) [i]s done with a deadly weapon, or in any manner whereby great bodily harm * * * can be inflicted." Kan. Stat. Ann. § 21-3414 (1988). We shall assume—as did the parties and both the state and federal courts below—that the state crime of which petitioner was convicted is the equivalent of one of the assault offenses enumerated in 18 U.S.C. 1153.

over "offenses defined by the laws of the United States." The federal courts retain their jurisdiction to entertain any prosecution under the Indian Major Crimes Act.[7]

Petitioner's construction of the second sentence of Section 3243—which renders federal jurisdiction exclusive wherever conduct is made criminal by federal law—directly conflicts with the first sentence's unqualified grant of jurisdiction to Kansas. In contrast, construing the second sentence to preserve *concurrent* federal authority over the same general subject matter best comports with the canon of construction that full effect should be given to all of the statute's language, see *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979)—a familiar canon that this Court has applied to statutes affecting Indians. See *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

Nor does this interpretation work an "implied repeal" of the Indian Major Crimes Act. In the first place, there is nothing "implied" about the effect of Section 3243: state jurisdiction follows from the express terms of the first sentence of that Section, which cannot be given effect unless the exclusivity of federal jurisdiction under Section 1153 is modified. Moreover, it is not the language of the Indian Major

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[7] Moreover, the subject matter jurisdiction of the federal courts over federal prosecutions under the Indian Major Crimes Act or 18 U.S.C. 1152 remains *exclusive* under 18 U.S.C. 3231. As a result, Kansas cannot prosecute any Indian in state court for violations of federal law; it must rely on state law. The fact that the same conduct might also be criminal under the Indian Major Crimes Act has no bearing on the validity of such state prosecutions.

Crimes Act itself that precludes the exercise of state jurisdiction over conduct by Indians that constitutes a federal crime under that Act. The preclusion flows, instead, from the general principle that States have no inherent jurisdiction over Indians in Indian country, *United States* v. *John*, 437 U.S. at 651-653; *Fisher* v. *District Court*, 424 U.S. 382 (1976), and may exercise such jurisdiction only where (as here) there is a clear grant of authority by Congress. *Williams* v. *Lee*, 358 U.S. at 221 ("when Congress has wished the States to exercise [criminal and civil adjudicatory jurisdiction] it has expressly granted [it to] them"); *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976). By virtue of that settled principle, Kansas would have been without jurisdiction to prosecute an Indian for commission of a major crime committed on an Indian reservation within its borders (prior to enactment of 18 U.S.C. 3243) even if the Indian Major Crimes Act had never been enacted. *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); cf. *Ex parte Crow Dog*, 109 U.S. 556 (1883); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-756 (1867). Conversely, by expressly granting the State jurisdiction over all offenses in Section 3243, Congress destroyed the underlying premise of the Indian Major Crimes Act's exclusivity (while at the same time preserving federal court jurisdiction over federal crimes.)

Finally, just as jurisdiction under the Indian Major Crimes Act ordinarily is exclusive of state jurisdiction, federal jurisdiction under 18 U.S.C. 1152 over other crimes committed by or against Indians in Indian country also is ordinarily exclusive of state jurisdiction. See pp. 8-9, *supra*. Accordingly,

under petitioner's view (that the second sentence of Section 3243 renders federal jurisdiction exclusive wherever it exists), the first sentence would actually confer jurisdiction on Kansas only over those offenses that are not also crimes defined by federal law.[8] In other words, Section 3243 would confer no concurrent jurisdiction at all. That view is contrary to the explicit text of the Act, as well as its legislative history, to which we now turn.

C. The Legislative History of Section 3243 Does Not Contradict Its Plain Language, And Instead Strongly Indicates That Congress Understood That State And Federal Jurisdiction Over Conduct Punishable Under Federal Law Would Be Concurrent

As we have argued, the language of Section 3243 plainly provides that Kansas has complete jurisdiction over crimes defined by state law that are com-

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[8] Under petitioner's view, the only offenses over which the State obtained jurisdiction under 18 U.S.C. 3243 would be those non-major crimes committed by one Indian against another (which, by virtue of the second sentence of 18 U.S.C. 1152, are ordinarily subject to the exclusive jurisdiction of the tribe concerned)—and, perhaps, those offenses defined by state law and assimilated into federal law by 18 U.S.C. 1152 and the Assimilative Crimes Act, 18 U.S.C. 13. The Tenth Circuit has held that assimilated state crimes are not "offenses defined by the laws of the United States" within the meaning of the proviso to 18 U.S.C. 3243. See *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d 1434, 1439-1440 & n.3 (1986); cf. *United States* v. *Bear*, 932 F.2d 1279, 1281 (9th Cir. 1990). Under that view, state jurisdiction over such offenses is exclusive, and the second sentence of Section 3243 preserves concurrent federal jurisdiction under 18 U.S.C. 1152 only over offenses that are independently defined by federal law. See F. Cohen, *Cohen's Handbook of Federal Indian Law* 375 & n.244 (1982 ed.)

mitted by or against Indians within that State, while also preserving federal jurisdiction over crimes defined by federal law. Contrary to petitioner's and his amici's contention, the legislative history does not contradict the plain import of the statute's language. See Pet. Br. 15-22; Devils Lake Sioux Tribe *et al.* Amici Br. 4-5. Indeed, that history confirms Congress's intent to establish a regime of concurrent jurisdiction.

1. The legislative history of the statute demonstrates three primary points: (a) prior to enactment of Section 3243, Kansas as a practical matter exercised jurisdiction over *all* crimes committed by or against Indians, regardless of whether they were major or minor or whether they were otherwise subject to federal jurisdiction; (b) the Indians in Kansas did not object to this regime, but rather sought enactment of Section 3243 to ratify the legality of the State's exercise of jurisdiction; and (c) Section 3243 was intended to confer on Kansas complete jurisdiction over all crimes (as defined by state law) committed on Indian reservations by or against Indians, while retaining jurisdiction in federal courts over crimes defined by federal law. See H.R. Rep. No. 1999, 76th Cong., 3d Sess. (1940) (House Report); S. Rep. No. 1523, 76th Cong., 3d Sess. (1940) (Senate Report).

Both the House and Senate Reports consist almost exclusively of a letter and memorandum from Acting Secretary of the Interior Burlew commenting on the proposal to confer jurisdiction on Kansas and the original version of the bill intended to accomplish that result. The Acting Secretary offered an alternative version of the bill that took account of views he expressed in the letter and memorandum, and it was that version that Congress enacted into law as Section

3243. Thus, the views of the Acting Secretary, who headed the agency responsible for administering Indian affairs, are of considerable relevance in construing Section 3243, *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979), especially since the responsible congressional committees adopted his views and proposal in their reports.

The letter and memorandum explain that Kansas then exercised jurisdiction over all crimes by or against Indians. The Acting Secretary expressed the view that without the exercise of jurisdiction by the State, law enforcement on Indian reservations in Kansas would have been inadequate. The reason was that existing federal criminal statutes "le[ft] some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts,"[9] and

[9] The memorandum accompanying the Acting Secretary's letter stated that it was "extremely uncertain" whether the Assimilative Crimes Act (now codified at 18 U.S.C. 13), which incorporates state law as federal law for offenses in areas of sole and exclusive federal jurisdiction, was applicable to areas of Indian country over which the United States had not acquired exclusive political jurisdiction. House Report at 3; Senate Report at 3. If the Assimilative Crimes Act was inapplicable, only the relatively few offenses separately defined by federal law would have been applicable in Indian country under what is now 18 U.S.C. 1152. Under that view, Acting Secretary Burlew was correct in stating (in the passage quoted in text) that "practically all minor offenses" by or against Indians on Indian reservations were "outside the jurisdiction of the Federal courts." Of course, as the Tenth Circuit pointed out in *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d at 1439 n.3, this Court subsequently made clear in *Williams* v. *United States*, 327 U.S. at 713-714, that the Assimilative Crimes Act does apply to Indian country through what is now 18 U.S.C. 1152.

that "[i]n the case of the four Kansas reservations * * * no tribal courts [had] existed for many years." House Report at 2; Senate Report at 2. As a practical matter, therefore, "offenses committed on these reservations and involving Indians have been prosecuted in the State courts, *even where the criminal act charged constituted one of the major offenses listed in [the Major Crimes Act]*." House Report at 4 (emphasis added); Senate Report at 3 (emphasis added). The Acting Secretary reported that "[t]hese State law prosecutions were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction." *Ibid.*

The bill was proposed because questions had then recently been raised about "the authority of the State courts to proceed in these cases," House Report at 4; Senate Report at 3, and the legislative history makes clear that the bill was enacted to ratify the then-existing regime of *de facto* state jurisdiction. Indeed, according to the Acting Secretary, the Indians themselves "[did] not desire reestablishment of the tribal courts, but * * * expressed a wish that the jurisdiction hitherto exercised by the State courts be continued." House Report at 4; Senate Report at 4. Inasmuch as the State had exercised jurisdiction over *all* offenses, including those defined as major crimes under federal law, both the Executive and the Legislative Branches plainly understood that the bill would confer jurisdiction over *all* offenses defined by Kansas law, whether or not those offenses were subject to federal jurisdiction as well. The Acting Secretary of the Interior made this point explicitly: "In short, the enactment of [Section 3243] will merely confirm a relationship which the State has willingly assumed,

which the Indians have willingly accepted, and which has produced successful results, over a considerable period of years." House Report at 5; Senate Report at 4."[10]

2. Petitioner contends (Pet. Br. 9-11) that an amendment to the bill that became 18 U.S.C. 3243 demonstrates that Congress intended federal jurisdiction over offenses covered by the Major Crimes Act to be exclusive. As originally proposed, the bill provided for "relinquish[ment]" of "concurrent jurisdiction" to Kansas, and specifically stated that the Indian Major Crimes Act, 18 U.S.C. 548 (1934)—as well as 25 U.S.C. 217 and 218 (1934), the predecessors of 18 U.S.C. 1152—would be "modified accordingly." See 86 Cong. Rec. 5596 (1940). Subsequently, both Houses adopted a substitute version that both re-

[10] Another feature of the legislative history supports this conclusion. The memorandum submitted by the Acting Secretary explained that only approximately one third of the lands on the Kansas reservations that had been allotted to individual Indians remained in trust status. The memorandum further explained that federal jurisdiction was then limited to reservation lands that remained in trust or restricted status. House Report at 4; Senate Report at 3; cf. *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 688 (1992). (Not until 1948 was Indian country defined to include all lands within an Indian reservation. See 18 U.S.C. 1151; *County of Yakima*, 112 S. Ct. at 689; *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984).) As a result, the State of Kansas in 1940 already exercised comp..te criminal jurisdiction over much of the Kansas reservations, albeit in a checkerboard pattern. One of the purposes of 18 U.S.C. 3243 was to minimize the difficulties arising from that regime by extending complete state jurisdiction throughout the reservations. House Report at 4-5; Senate Report at 4. Petitioner's interpretation of 18 U.S.C. 3243, however, would reintroduce a checkerboard pattern of state jurisdiction.

vised the language conferring jurisdiction on the State (by, *inter alia*, deleting the reference to "concurrent" jurisdiction) and omitted the explicit modification of the Indian Major Crimes Act and what is now 18 U.S.C. 1152. In light of those revisions, petitioner argues that Section 3243, as enacted, must be construed as *not* conferring concurrent jurisdiction and as *not* modifying the exclusive aspect of federal jurisdiction under the Indian Major Crimes Act." Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

Rather than supporting petitioner's position, however, the amendment confirms our reading of Section 3243. Petitioner fails to point out that the substitute version was proposed by the Acting Secretary in order to express more accurately the legal situation as it then existed and as it was "intended to be created." House Report at 3; Senate Report at 2. In particular, because federal courts apparently had exercised jurisdiction only over major crimes, the Acting Secre-

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[=] Petitioner relies heavily (Pet. Br. 16-17) on the district court's decision in *Youngbear* v. *Brewer*, 415 F. Supp. 807, 812-813 (N.D. Iowa 1976), aff'd, 549 F.2d 74, 76 (8th Cir. 1977), which construed the Iowa Act and, based largely on the sequence of events described in the text, concluded that federal jurisdiction over major crimes remained exclusive. In reaching that conclusion, the *Youngbear* court dismissed Acting Secretary Burlew's letter and its accompanying memorandum—which unambiguously support our position—because those materials "refer[] to the original bill, which was drafted by the Interior Department and would have explicitly granted concurrent jurisdiction." 415 F. Supp. at 813 n.5. That rationale was plainly wrong. The Acting Secretary's comments on which we rely were made in the course of suggesting amendments to the bill, and the final statute included those amendments in their entirety.

tary thought that it was inaccurate to describe the bill as generally "relinquishing" "concurrent" jurisdiction to Kansas; rather, in his view, it would confer complete criminal jurisdiction on the State over both major and minor crimes, whether or not the federal government would also have jurisdiction over the particular offense. He explained:

> The bill proposes to "relinquish concurrent jurisdiction" to the State of Kansas, intending thereby *to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law.* However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, *but a case of conferring upon the State complete criminal jurisdiction*, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

House Report at 3 (emphasis added); accord, Senate Report at 2. Thus, the substitute bill the Acting Secretary proposed (and Congress enacted) was intended to make clear that Section 3243 would confer jurisdiction over *more* than those offenses that then happened to be subject to federal law—not, as petitioner asserts, to narrow the scope of the bill by withholding jurisdiction from the State over crimes stemming from conduct that also is unlawful under federal law.[=] See Pet. App. 60-61; *Iowa Tribe of Indians* v.

[=] See also House Report at 5 ("The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not."); accord, Senate Report at 4.

Kansas, 787 F.2d at 1439-1440. As the court of appeals correctly noted, the "decision to excise the word 'concurrent' * * * was to clarify rather than to change [the] substance" of what is now 18 U.S.C. 3243. Pet. App. 61.[11]

The Acting Secretary also explained that the second sentence of 18 U.S.C. 3243 was intended only to ensure that "prosecution in the Federal courts of those

[11] The Acting Secretary did not explain why his substitute lacked a provision stating that the Indian Major Crimes Act and what is now 18 U.S.C. 1152 were "modified accordingly." At least two explanations are possible. First, because the substitute version expressly provided that the State would have complete jurisdiction and that the United States would retain whatever jurisdiction it then had over offenses defined by federal law (namely, those under the Indian Major Crimes Act and what is now 18 U.S.C. 1152), there was no need to reiterate what the effect on the latter statutory provisions would be. See Pet. App. 61 ("Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead."). Second, the "exclusive" nature of federal jurisdiction over offenses covered by the Indian Major Crimes Act and what is now 18 U.S.C. 1152 derived not from those specific statutory provisions, but from more general principles of Indian law that rendered state law inapplicable to matters involving Indians in Indian country. See pp. 13-14, *supra*. The express conferral of criminal jurisdiction on Kansas in the first sentence of Section 3243 was accordingly sufficient to displace those general principles of preemption, and there was no need to "modify" the Indian Major Crimes Act or the predecessors of 18 U.S.C. 1152 in order to provide for state jurisdiction. In any event, any negative inference that might be drawn from the mere absence of an "express" modification of the Indian Major Crimes Act is wholly insufficient to overcome the clear import of the all-encompassing statutory text and legislative history.

offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable." House Report at 5; Senate Report at 4. It would have been extraordinary to refer to a mere lack of *preclusion* of federal jurisdiction if, as petitioner urges, federal jurisdiction over major crimes was to remain *exclusive*. More importantly, the obvious corollary to the Acting Secretary's statement was that the State would have jurisdiction in *all* cases, with federal jurisdiction serving as a backstop, to be exercised on a case-by-case basis where that course seemed "advisable"—*e.g.*, where the State declined to exercise jurisdiction.

3. Finally, petitioner relies (Pet. Br. 17) on a letter from Representative Lambertson of Kansas to the House Committee on Indian Affairs recommending enactment of the proposed bill. See House Report at 1-2.[12] In that letter, Representative Lambertson noted that "[t]he Government here relinquishes to the State full jurisdiction over the Indians for small offenses." *Id.* at 2. The negative implication, petitioner argues, is that Congress intended to confer no jurisdiction over crimes included in the Major Crimes Act.

That argument is entirely unpersuasive. If anything, the fact that Representative Lambertson understood Congress to be relinquishing to Kansas

[12] Petitioner states that the Tenth Circuit in *Iowa Tribe of Indians* v. *Kansas*, 787 F.2d at 1440, "held that this letter * * * was the most persuasive evidence of congressional intent." Pet. Br. 16 n.1. In fact, the Tenth Circuit did not so hold, but merely noted in passing (erroneously, in our view) that the letter was "perhaps" the most persuasive evidence of congressional intent.

"full" jurisdiction over "small offenses"—with the implication that there would be no federal jurisdiction over those offenses—suggests that he believed the State would acquire only partial (*i.e.*, concurrent) jurisdiction over major crimes. See Pet. App. 57-58.[15] It certainly does not suggest that the State would have no jurisdiction over major crimes, a position entirely irreconcilable with the plain language of the first sentence of the proposed statute; indeed, Representative Lambertson did not address the question of major crimes at all. Acceptance of petitioner's view (that Representative Lambertson's letter contained a negative implication that federal major crimes jurisdiction was to remain exclusive) would leave us, like the court of appeals, "at a loss to expla[i]n why [the letter] contravenes" the rest of the legislative history, "which clearly evince[s] an understanding that Kansas * * * could exercise criminal jurisdiction over all

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[15] In stating that Kansas acquired "full" jurisdiction over "small offenses," Representative Lambertson may have been referring to non-major crimes committed by one Indian against another. Because such crimes are excluded from federal jurisdiction under 18 U.S.C. 1152 by the second sentence of that provision—and because the Tribes concerned did not have tribal courts that could exercise jurisdiction over such crimes—Kansas acquired "full" jurisdiction over those crimes under Section 1162.

Another possibility is that Representative Lambertson shared the view (discussed in note 8, *supra*) that 18 U.S.C. 1152 did not apply to a large number of offenses between Indians and non-Indians because it did not incorporate state-law crimes as federal crimes through the Assimilative Crimes Act. Under that view (which has since been proven wrong), the State would have acquired "full" jurisdiction (exclusive of the United States) over such state-law crimes. See also note 8, *supra*.

state-law crimes occurring on Indian lands." Pet. App. 58.[16]

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[16] Amici Devils Lake Sioux Tribe, *et al.*, err in suggesting (Br. 5-21) that the background of the special jurisdictional statutes passed (and patterned) after the Kansas Act supports petitioner's interpretation of that Act. Petitioner cites nothing in the legislative history of those statutes that gives any indication that the conferral of jurisdiction on the States involved was less than complete. Indeed, to the extent the legislative history of those later-enacted statutes has any relevance here, see *Sullivan* v. *Finkelstein*, 496 U.S. 617, 631-632 (1990) (Scalia, J., concurring), it supports our interpretation of the Kansas Act.

The legislative history of the Iowa Act clearly establishes that Iowa was to have complete jurisdiction over the Sac and Fox Reservation. See H.R. Rep. No. 2356, 80th Cong., 2d Sess. 4 (1948) (letter from Undersecretary of the Interior) (emphasis added) ("While under this bill the State officers and the State courts will have jurisdiction over *all* offenses, the proviso reserves a right in the Federal court to exercise jurisdiction in the class of cases indicated."); *id.* at 3 (letter from Assistant Attorney General) (emphasis added) (Iowa Act is "substantially the same" as Kansas Act, under which "*concurrent* jurisdiction was conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations").

In addition, the legislative history of the North Dakota Act describes that Act in all-inclusive terms. For example, the Acting Secretary of the Interior stated that the bill's purpose was "to assure these Indians that they will continue to be subject to the same laws and courts as other citizens and residents of the State." S. Rep. No. 997, 79th Cong., 2d Sess. 2 (1946); accord, H.R. Rep. No. 2032, 79th Cong., 2d Sess. 2 (1946). The committee reports also contain a resolution adopted by the Indians of the Devils Lake Tribe recommending enactment of the bill, in which the Indians acknowledged that the state courts had for more than 40 years exercised jurisdiction over them, and expressed their belief that they should be treated the same as all other citizens of the

D. Construing Section 3243 As Granting Complete Jurisdiction To Kansas To Prosecute All Crimes Defined By State Law Does Not Conflict With General Principles Of Indian Law

Failing to make a convincing argument from the statutory text or legislative history, petitioner and his amici fall back to arguments based on general principles of Indian law. In particular, they place heavy reliance (Pet. Br. 11-14; Devils Lake Sioux Tribe *et al.* Br. 21-28) on the canon of construction that statutes are to be liberally construed in favor of the Indians. See, *e.g.*, *Bryan* v. *Itasca County*, 426 U.S. at 392; *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 79 (1918); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).

That doctrine does not require a different construction in this case, however, for two reasons. First, the canon favoring liberal construction of statutes in favor of Indians simply cannot overcome the clear text and legislative history of Section 3243. See *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Second, Section 3243 was enacted in part on the understanding that the Kansas tribes had "expressed a wish that the jurisdiction hitherto exercised by the State courts be continued." House Report at 4-5. The committee reports explain that prior state prosecutions—including those for major crimes—"were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction." *Id.* at 4; Senate Report at 3. The reports further explain that the Indians had expressed a desire for unified and effective law enforcement on the reservations within Kansas because they were unable to establish a tribal system of justice. See House Report at 4-5; Senate Report at 3-4. Congress responded by enacting Section 3243 as a means of advancing the Indians' interests. The doctrine that statutes should be construed to favor Indians is not a basis for reflexively granting an individual Indian like petitioner his preference as to which sovereign will prosecute him for a crime—especially in the face of the contrary view of "[t]he tribal councils of all four [Kansas] tribes," which, Congress was told, went "on record in favor of a transfer of jurisdiction in criminal matters to the State." House Report at 4; Senate Report at 4. Like the court of appeals, this Court should be "unwilling to conclude that state court criminal jurisdiction *conferred by Congress in response to tribal requests* invades the special relationship between the tribes and the federal government." Pet. App. 62. Compare *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 892-893 (1986) (noting importance of tribal consent in conferring jurisdiction on States with respect to matters affecting Indians).

Finally, petitioner finds it "inconceivable that Congress would pass a law subjecting a Kansas Indian to prosecution [in] both the state and federal courts." Pet. Br. 13. Of course, given the background of state prosecution of all crimes, major and minor, and the statute's purpose of ratifying that practice, that result plainly is not inconceivable. To the contrary,

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State. S. Rep. No. 997, *supra*, at 3; H.R. Rep. No. 2032, *supra*, at 3.

Finally, the House Report on the 1948 precursor to Public Law 280, which amici concede (Br. 10) was identical in substance to the Kansas, North Dakota, and Iowa Acts, describes the bill as vesting "concurrent" jurisdiction in the States. H.R. Rep. No. 1506, 80th Cong., 2d Sess. 2 (1948).

establishing a regime of complete state jurisdiction, with concurrent federal jurisdiction over crimes defined by federal law, was the explicit purpose of the statute. Moreover, as the court of appeals stated, the mere existence of overlapping state and federal jurisdiction to prosecute is not unjust, especially where "the overlap resulted from legislation requested of Congress by the Tribes." Pet. App. 63. Petitioner cites no instance in which a Kansas Indian has been prosecuted in both the state and federal courts, and the Justice Department's *Petite* policy would limit those instances in which a federal prosecution might be brought following a state prosecution. See *Petite* v. *United States*, 361 U.S. 529 (1960); *Rinaldi* v. *United States*, 434 U.S. 22 (1977).[17]

In sum, none of petitioner's policy arguments should dissuade this Court from giving effect to the unambiguous terms of 18 U.S.C. 3243, under which the State of Kansas had jurisdiction to prosecute him for his crime of aggravated battery.

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[17] Moreover, at the time Section 3243 was under consideration, there was apparently no basis for the Kansas Indians to fear actual injustice in the form of unequal treatment at the hands of the State. The Department of the Interior's memorandum noted that "the superintendent in charge of the Kansas reservations * * * states that in the State courts 'an Indian may not only expect a square deal but, if anything, there is a tendency to be more lenient' " with Indians in comparison with other offenders. House Report at 4; Senate Report at 4.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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